No. 736

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JOHN T. FEY, Cl

IN THE SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1956

THE CONTINENTAL BANK AND TRUST COMPANY OF SALT LAKE CITY, UTAH,
Petitioner,

vs.

EMERY J. WOODALL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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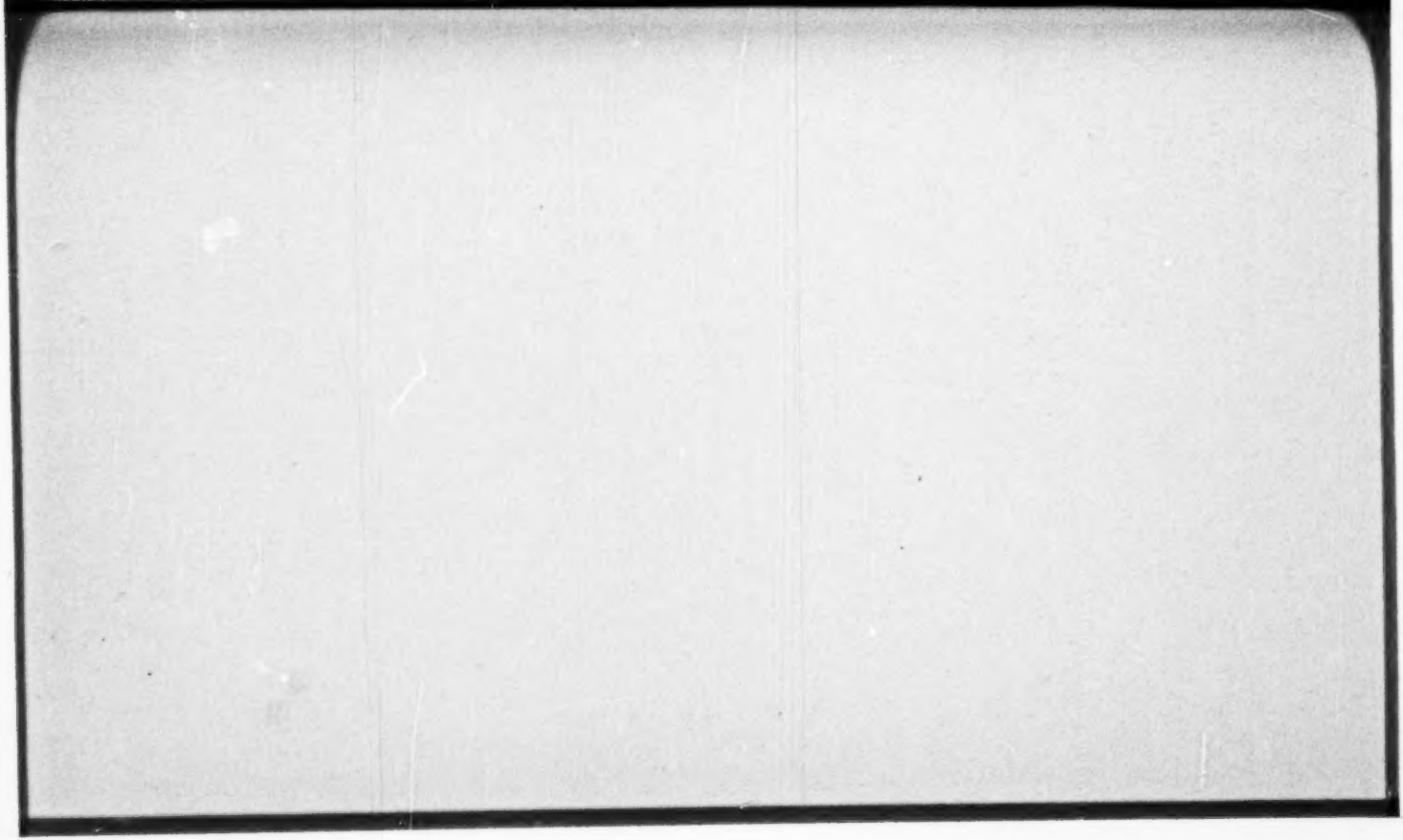
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue for review of the judgment of the United States Court of Appeals for the Tenth Circuit entered on the 2nd day of January, 1957.

CITATION OF OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is printed in Appendix A hereto at page 17 and is not yet reported in the Federal Reporter System. No opinion was written by the District Court.

JURISDICTION

The Judgment of the Court of Appeals was entered on January 2, 1957. Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the Board of Governors of the Federal Reserve System has the power under the Federal Reserve Act to require a state member bank after admission to the Federal Reserve System to increase its capital by an amount *determined by the Board* under pain of forfeiture of its membership in the Federal Reserve System.

STATUTE INVOLVED

The statute involved is the Federal Reserve Act as amended (Act of December 23, 1913, Chap. 6, 38 Stat. 251, 12 U.S.C. 221 et seq.). The portions of Sections 9 and 11 (i) of that Act, cited by the Court below, are printed in Appendix B hereto, infra, at page 25.

STATEMENT

This action grows out of an attempt by the Board of Governors of the Federal Reserve System, hereinafter called the Board, to require The Continental Bank and Trust Company, a Utah banking corporation to increase its capital by $1,500,000, (later raised in the Board's statement of particulars to the "approximate range of $2,400,000—$2,900,000"). (DR 11) The Board made its original demand in February, 1956; in May, 1956, the bank's stockholders, by an overwhelming vote, declined so to increase the bank's capital. On June 29, 1956, the Board instituted proceedings for an administrative hearing under Section 9 of the Federal Reserve Act (12 U.S.C. 327) and under the Administrative Procedure Act for the purpose of determining:

"(a) The adequacy or inadequacy of the net capital stock and surplus of The Continental Bank and Trust Company in relation to the character and condition of its assets and to its present and prospective deposit liabilities and its other corporate responsibilities, and

(b) What net additional amount, if any, of the capital funds is needed by The Continental Bank and Trust Company to have an adequate capital structure, and

(c) What is a reasonable period of time to allow The Continental Bank and Trust Company to effect any increase in its capital structure as may be found to be needed to make them adequate before being required by the Board of Governors to forfeit its capital stock in the Federal Reserve Bank of San Francisco and to forfeit all its rights and privileges of membership in the Federal Reserve System for failure to do so."

(Excepts from the Notice of Hearing filed by the Board. DR 6)

Believing that public knowledge of the facts adduced at a public hearing would be less harmful to the Bank than leaks and rumors issuing from a closed hearing, the Bank requested that any hearing by the Board of Governors with respect to imposing sanctions for the Bank's failure to accede to the suggestion and demands of the Board of Governors be made public. Accordingly, the Board made the hearing public. (DR 42)

The hearing was originally set to commence on September 10, 1956, in Salt Lake City, Utah, and was later continued by the Board to October 3, 1956. Pursuant to Section 11 of the Administrative Procedure Act, Emery J. Woodall, respondent herein, was desig-

nated as the trial examiner to conduct the hearing and take the evidence.

The Bank, pursuant to Section 5 of the Administrative Procedure Act, filed with the Board a demand for a more definite statement of legal authority and jurisdiction and matters of fact and law asserted. In response thereto, the Statement of Particulars filed by the Board stated (DR 10) the Board was relying on its Regulation H and particularly Section 7 thereof titled "Conditions of Membership". Section 7 states it is issued "pursuant to the authority contained in the first paragraph of Section 9 of the Federal Reserve Act" (12 U.S.C. 321) and provides in its last paragraph:

> "If at any time, in the light of all the circumstances, the aggregate amount of a member state bank's net capital and surplus funds appear to be inadequate, the bank, within such period as shall be deemed by the Board to be reasonable for this purpose, shall increase the amount thereof to an amount which in the judgment of the Board shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities."

The Bank moved to dismiss the administrative proceeding (DR 18) on the ground that the Federal Reserve Act did not grant the power to the Board of Governors to inquire into the capital adequacy or inadequacy of a state member bank or to require such bank to acquire such additional capital as the Board may determine within a time specified by the Board of Governors, or to forfeit its membership in the Federal Reserve System, and further, even if the

Board's Regulation H so provided, it was an unlawful usurpation of power not delegated to the Board by the Congress. It was Petitioner's position in making such motion and it is Petitioner's contention here that the Federal Reserve Act does not authorize the above quoted paragraph in Regulation H.

On September 29, 1956, the Board denied the Bank's motion to dismiss on the ground "the proceedings herein instituted are authorized under the Act and the regulations issued pursuant thereto." (DR 27) The Order recited as its legal authority a portion of the Preamble to the Federal Reserve Act, Paragraphs 1, 6, 9, and 11 of Section 9 (12 U.S.C. 321, 324, 327, 329) and sub-paragraph i of Section 11 (12 U.S.C. 248 (i)) of the Federal Reserve Act.

On October 2, 1956, the Bank filed this action in the United States District Court for the District of Utah to enjoin Emery J. Woodall, the hearing examiner appointed by the Board, from conducting the hearing on the ground that such proceeding was not authorized by law and was beyond the jurisdiction of the Board, and that such hearing would irreparably injure the bank and tend to undermine the confidence of its customers and depositors and endanger its ability to perform its normal banking operations. (DR 1)

Upon the pleadings and affidavits, the trial judge found that such a hearing should not be held to the irreparable injury to the Bank, unless the Board possessed the power to conduct a hearing to inquire into the capital adequacy or inadequacy of a state member

bank and the court issued its temporary restraining order against the defendant Woodall, restraining him from proceeding further with the hearing. (DR 32)

The complaint, summons and temporary restraining order were served on the defendant Woodall in Salt Lake City, Utah, on October 2, 1956, and on the same day his counsel (also the Board's counsel) requested the Court for an immediate hearing on the preliminary injunction and on his motion to dissolve the temporary restraining order, to dismiss the preliminary injunction and to dismiss the complaint. (DR 34) These motions were heard the next day.

At the close of oral argument, the District Court concluded that the Board was acting within its jurisdiction and power and dismissed the action. (DR 51) Plaintiff's counsel indicated that an appeal was intended, as this is a case of first instance, (DR 52) and the Court amended its ruling so as to hold both the Board of Governors and "perhaps the United States" were necessary parties and that the court had no jurisdiction to hear the matter under the decision in *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 and *Oyler* v. *McKay* (10th Cir. 1955), 227 F2d 604. (DR 53)

The Bank filed notice of appeal to the Court of Appeals for the Tenth Circuit on the next day (DR 44) and a stay of the administrative proceeding, pending appeal, was granted by one of the circuit judges on October 8, 1956. (AR 1) This stay order was subsequently continued by the Court of Appeals until the Appeal could be heard and decided. (AR 3)

On January 2, 1957, the Court of Appeals for the Tenth Circuit entered its opinion (AR 5) affirming the District Court's finding that the Board of Governors was "clothed with power to order the hearing" and that, therefore, the Board of Governors was an indispensable party to the action to restrain the conducting of such hearing. It is to review that judgment that this Petition is filed.

On January 4, 1957, the Court of Appeals entered its order (AR 16) further staying the administrative hearing until February 4, 1957, to allow Petitioner opportunity to file this Petition for Certiorari. Petitioner has been advised by the Board's counsel that the administrative proceedings will not continue until this Court disposes of this case.

(References to the record in the District Court are shown as (DR). References to the record in the Court of Appeals are shown as (AR).

REASONS FOR GRANTING THE WRIT

I. The fundamental issue in this case involves an important interpretation of the Federal Reserve Act, i.e., whether the Federal Reserve Act authorizes the Board to require a state chartered bank, as a condition of continued membership in the Federal Reserve System, to increase its capital whenever the Board finds such capital to be inadequate. An analogous issue as to the validity of a single condition of membership imposed on a state bank by the Board persuaded this Court to grant certiorori in *Eccles* v. *People's Bank*, 322 U.S. 755, 92 L ed. 342. In that case, on the hearing on the merits, (333 U.S. 426, 92

L ed. 784) this Court found the issue not yet ripe for judicial determination and, without passing on the issue as to the power of the Board, reversed the lower court on the ground that the Board had not yet sought to enforce the objectionable condition. In this case, there is no ripeness-for-review question. Here the Board has actually commenced proceedings to enforce a condition of membership which Petitioner asserts is not authorized by law, and has made a final administrative decision as to its power to do so.

This case is of greater importance than the People's Bank litigation because this case involves a regulation of general application and not merely a condition applicable to one bank alone as in the People's Bank case. In the People's Bank case the petition for certiorari filed by the Board stated, "This case presents for the first time in the courts an important question concerning the statutory authority of the Board to condition the admission of banks to system membership". That statement as to the primal nature of the issue still holds. The validity of the regulation imposing such conditions has never been passed upon by any court save in the lower courts here. The important question in the interpretation of the Federal Reserve Act concerning the power of the Board to impose conditions of membership is still undecided. It should be settled by this Court.

II. While the instant case involves the attempt of the Board to require the petitioner bank to increase its capital, the issue is one of paramount interest not only to the Board in the exercise of its supervisory

powers, but to the 1832[1] banks in the United States which are state chartered member banks of the Federal Reserve System. The question is not of mere academic interest to those banks. The Board of Governors' regulation H states that a member bank's capital shall be "adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities". No definition is given in this regulation as to the meaning of the term "adequate" nor how the character and condition of a bank's assets and the relation of capital to its deposits and other liabilities are to be considered. That application is left by Regulation H to banking and finance economists and other specialists, and to the broad discretion of the Board of Governors of the Federal Reserve System acting without any standards of reference.

The "traditional" rule of thumb used by banking theorists for generations in considering the adequacy of a bank's capital has been that the ratio of capital to deposits should not be less than $1 of capital for each $10 of deposits.[2] As of June 30, 1956, the arithmetical average ratio of all operating insured commercial banks was $1 of capital to every $11.9 of deposits.[3] If this traditional approach were used, most banks[4] would have "inadequate" capital and be vitally concerned with this question of the Board of Governors'

1. Federal Reserve Bulletin, October, 1956, p. 1087.
2. Madden, Nadler & Heller, *Money Market Primer*, pp. 111-112.
3. Federal Reserve Bulletin, op cit.
4. According to Business Week for January 19, 1957, the ratio of capital funds to deposits of the five largest banks in the United States were: Bank of America, 1-16; Chase Manhattan, 1-12; First National City, 1-12; Manufacturer's Trust, 1-14; and Chemical Corn Exchange, 1-12.

power under Section 9 of the Federal Reserve Act to compel capital increase or forfeit their membership.

The Federal Deposit Insurance Corporation has adopted as a test of capital adequacy[5] the ratio of capital funds to total assets and uses the national average of such ratios as the minimum standard. It hardly need be pointed out that when a national average is the standard, a substantial number of the banks used in computing the average are going to be below the standard. According to the FDIC annual report for 1954, there were, as of June 30, 1954, 489 insured commercial banks with a ratio of capital to total assets within the range of 4% to 4.9%, within which category appellant bank falls. If the Board in this case adopted this test, some 488 other banks are equally vitally concerned with the question of the power of the Board to require capital increases, assuming such 488 banks to be members of the Federal Reserve System.

The Board of Governors in its informal pronouncements on the subject[6] has indicated it considers the FDIC ratio and the ratio of capital to risk assets as rule of thumb tests for capital adequacy. But economists do not agree on a definition of "risk assets" in determining such ratios. The most conservative definition is that risk assets are all the assets of a bank less cash and United States government securities. Applying this definition, as of June 30, 1956, the risk asset ratio of all Federal Reserve System

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5. Freeman: "The Problems of Adequate Bank Capital", Chicago, 1952.

6. Freeman, op cit.

member banks was approximately 1 to 7.[7] Of the 6500 member banks, (both state and national) a substantial number of banks will be below this average. The number of banks above the 1 to 7 ratio will tend to increase and the average ratio will tend to rise under the present "tight money" policy of the Board of Governors of the Federal Reserve System which has forced banks to increase their loan portfolios in relation to investments in government securities in order to serve their community needs. As recently as 1953, the comptroller of the Currency, who supervises national banks, used the risk asset ratio of one to six as a screen to test capital adequacy.[8] Yet, as we have pointed out, only three years later, the national average is already one to seven.

Thus, the issue of capital adequacy and the power of the Board of Governors to take action with respect thereto is very real not only to petitioner here, but to many hundreds of banks throughout the country, if not the entire banking industry. The Board of Governors asserts that the Federal Reserve Act empowers it to use its own discretion as to how much is adequate with only the most general criteria of character and condition of assets and deposit liabilities and other corporate responsibilities to be considered. The petitioner believes that the Federal Reserve Act gives to the Board no such power over a bank's capital after admission, and that the Board's imposition of conditions of membership must be, as

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7. Federal Reserve Bulletin, October, 1956.

8. Missouri Banker's Assn., "Bank Capital Structures & Ratios", July, 1953.

the statute provides, only those "pursuant" to the Federal Reserve Act. (12 U.S.C. 321)

III. Petitioner believes the decision of the Court below resulted from a misunderstanding of the basic issue, with a consequent error in its determination. The Federal Reserve Act makes no grant of authority to the Board to inquire into capital adequacy of a state bank once it is a member of the Federal Reserve System. Respondent has recognized this fact and has argued below that such power must be implied from the preamble to the Federal Reserve Act and the general grant of power in other sections of the act so as to broaden the power specifically limited in Section 9 of the Federal Reserve Act. Petitioner in its brief to the Court of Appeals presented in detail the statutory history of the amendments to Section 9, which clearly indicates there was "no intent of Congress . . . to create in the Federal Reserve Board a body to prescribe any kind of conditions it pleased as conditions precedent to admissibility to the Federal Reserve System . . ." *People's Bank of Lakewood Village* v. *Eccles*, 161 F2d 636 (D.C. Cir. 1947).

The Court below, apparently without analysis of the various sections of the Federal Reserve Act and its history, failed to differentiate between "impairment of capital" and "capital inadequacy" and thus, resolved the issues as to the Board's power in the Board's favor. The Court of Appeals' reasoning is summed up as follows in its opinion:

> ". . . it is the continuing duty and function of the Board to see that such bank either comply with the capital and reserve requirements of

the Act and does not suffer *impairment* of its capital structure or surrenders its stock in the Federal Reserve Bank and cease to be a member of the Federal Reserve System. The object and purpose of the scheduled hearing now under consideration was to inquire into the condition of the Bank in respect to whether it had *suffered inadequacy* of capital structure, if so what corrective procedure should be invoked, and whether the Bank should be required to surrender its stock in the Federal Reserve Bank and cease to be a member of the Federal Reserve System. And we entertain no doubt that under the provisions of the section of the Act, the Board had power to conduct the hearing for such purposes." (AR 11) (emphasis supplied)

The capital requirements set forth in the Federal Reserve Act do not refer to "adequacy". The Act, at the time Petitioner was admitted to membership, required only that a state bank have a certain amount of capital based on the population of its place of business. The requirement that a member bank not reduce its capital was added in 1952.[9] The Board has not contended either that Petitioner bank did not have the capital required for admission or that it has reduced its capital since admission. In fact, the bank's capital has increased from $2,392,651.29 when it was admitted in January, 1952, to $3,209,057.22 on December 31, 1956. Nor has the bank's capital become impaired. Its capital account on June 30, 1956, when the Board of Governors instituted the administrative proceeding, asserting capital inadequacy, was as follows:

9. 12 U.S.C. 329, as amended by Act of July 15, 1952, Ch. 753, Sec. 1, 66 Stat. 633.

Capital	$1,800,000
Surplus	1,010,000
Undivided profits	215,110.24
	$3,025,110.24

On December 31, 1956, that capital account, as reported to the Federal Reserve Bank of San Francisco was:

Capital	$1,800,000
Surplus	1,060,000
Undivided profits	349,057.22
	$3,209,057.22

In addition to increasing its capital account by $173,946.98 in six months, the Bank paid to its stockholders during the year 1956, dividends in the sum of $198,000.00.

In short, the Court of Appeals' reasoned that since the Board, it said, has the power to correct capital impairment, it has the power to determine whether the bank "had *suffered* inadequacy". The use of "suffer" indicates the misconception that "impairment" and "inadequacy" may be equated. "Impairment" would mean that the bank's assets had, *in fact*, so declined in value that the excess of its assets over its liabilities would be less than $1,800,000 and that the surplus and undivided profits had been wiped out. Thus, "to suffer" used in the sense "to endure" or "to undergo" would be appropriate in connection with "impairment". On the other hand, "adequacy or inadequacy" is a relative concept of judgment indicating whether the total capital account available constitutes a sufficient cushion to meet deposit and other liabilities in the suppositious event of a decline in value

of the bank's assets. This judgment, of course, requires a reliable crystal ball to predict the future character of both a bank's assets and its liabilities. Thus, the words "had suffered" in the sense of "endured or undergone" would have no meaning at all when predicting the future.

We believe that the Congress did not intend to grant the Board the power so to predict the future and that such an implied power cannot and need not be found here, least of all on the basis of the faulty syllogism employed by the Court of Appeals.

We believe this Court should pronounce the final word on this important question in the Federal Banking System in light of a careful analysis of the provisions of the Federal Reserve Act and the economic factors involved in its administration. This the Court of Appeals did not do.

Respondent in the courts below raised issues as to the joinder of the Board as an indispensable party and the exhaustion of administrative remedies. As to the latter issue, the Court of Appeals, apparently adopting Petitioner's view that the test of reviewability imposed by the Administrative Procedure Act and by this court in *Eccles* v. *People's Bank*, supra, went to the heart of the controversy. As to the indispensable party issue, this Petitioner contended below that the decisions of this court in *Williams* v. *Fanning*, 332 U.S. 490, *Hynes* v. *Grimes Packing Company*, 337 U.S. 86, and *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, were dispositive of the issue. In any event, the

reasoning of the Court below in applying *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682, made the determination of the issue as to the power of the Board, and hence whether respondent was acting ultra vires, esential. Its wisdom on this issue will necessarily stand or fall depending on this court's decision on the fundamental issue in this case, i.e., whether the Board has the statutory authority to require petitioner to increase its capital.

CONCLUSION

This case presents in a posture ripe for determination, an important issue involving the construction of the banking laws of the United States which has never been passed upon by this Court and which has been decided erroneously by the Court of Appeals. Unless this Court reviews and determines the issue here, there is no possibility of curbing the assumption of power by the Board far beyond that granted by the provisions of the Federal Reserve Act.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term - 1956

THE CONTINENTAL BANK AND TRUST COMPANY, of Salt Lake City, Utah,
Appellant,
vs.
EMERY J. WOODALL,
Appellee.
Number 5498

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH

Peter W. Billings (Albert J. Colton and Fabian, Clendenin, Moffat & Mabey were with him on the briefs) for Appellant.
Bolling R. Powell, Jr., for Appellee.

Before BRATTON, Chief Judge, and HUXMAN and PICKETT, Circuit Judges.

BRATTON, Chief Judge:

This case presents for determination questions of law arising out of the attempt of the Board of Governors of the Federal Reserve System, hereinafter referred to as the Board, to conduct a hearing in respect to the capital adequacy or inadequacy of a state bank member of the Federal Reserve System.

Continental Bank and Trust Company, of Salt Lake City, Utah, hereinafter referred to as the Bank, is a state bank member of the Federal Reserve System.

The Board issued an order for a hearing to be held at Salt Lake City for the purpose of determining the adequacy or inadequacy of the net capital stock and surplus of the Bank in relation to the character and condition of its assets and to its then present and prospective deposit liabilities and its other corporate responsibilitiess; determining what additional amount, if any, of capital funds were needed by the Bank to have an adequate capital structure; and determining what was a reasonable period of time to allow the bank within which to effect any increase of capital funds found to be needed to make them adequate before being required to surrender its capital stock in the Federal Reserve Bank of San Francisco and to forfeit its rights and privileges of membership in the Federal Reserve System for failure to do so. The Bank moved the Board to dismiss the proceeding upon the ground that the Board had no authority to inquire into the capital adequacy or inadequacy of a state bank member of the Federal Reserve System, or to require such a bank to acquire additional capital or forfeit its membership in the Federal Reserve System. The motion was denied. The Bank requested that the hearing be public and the Board acquiesced therein. Emery J. Woodall was designated as trial examiner to conduct the hearing and take evidence. Shortly before the hearing was scheduled to begin, the Bank instituted this action against Woodall to enjoin him from conducting the hearing upon the ground that the Board for whom he was acting had no power to conduct a hearing for such purposes. A temporary restraining order was issued. Later the restraining order was

vacated and the action was dismissed. The Bank appealed.

The focus of the attack upon the judgment dismissing the action is that the Board has no power to inquire into the capital adequacy or inadequacy of a state bank member of the Federal Reserve System; that the conducting of the hearing in question would result in irreparable injury to the Bank; and that therefore the court should have enjoined the holding of the hearing. The court predicated in part its dismissal of the action upon the view that the Board was an indispensable party. It is the well established rule of law that where a federal official attempts to perform an act which is in excess of his authority or under authority not validly conferred, an equitable action will lie to restrain him without the sovereign being a party; but where he acts within the range of his authority in the exercise of a function legally delegated to him, an action to restrain him cannot be maintained without the sovereign being impleaded even though there is an assertion of error in the exercise of such power or an abuse of discretion. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682; State of New Mexico v. Backer, 199 F. (2d) 426; Oyler v. McKay, 227 F.(2d) 604; Ogden River Water Users' Association v. Weber Basin Water Conservancy, CA-10, ...F.(2d).....

The action was not one to restrain the trial exainer on the ground that he was acting beyond the range of the order of the Board. The essence of the cause of action pleaded in the complaint was to restrain the trial examiner on the ground that the Board

had no power to order the hearing. Section 9 of the Federal Reserve Act, as amended, makes provision for banks incorporated under state law to become members of the Federal Reserve System. It provides that a state bank desiring to become such member may make application to the Board, under such rules and regulations as the Board may prescribe, for the right to subscribe to the stock of the Federal Reserve Bank organized within the district in which the applying ban kis located; and that the Board, subject to the provisions of the Act and to such conditions as the Board may prescribe pursuant to the Act, may permit the applying bank to become a stockholder in such Federal Reserve Bank. 12 U.S.C.A. §321. The section further provides that in acting upon the application of an applying state bank, the Board shall consider the financial condition of such bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purpose of the Act. 12 U.S.C.A. §322. The section further provides that whenever the Board shall permit an applying bank to become a stockholder in the Federal reserve Bank of the district, its stock subscription shall be payable on call of the Board, and stock issued to it shall be held subject to the provisions of the Act. 12 U.S.C.A. §323. The section further provides that all banks admitted to membership in the Federal Reserve System under the provisions of the section shall be required to comply with the capital and reserve requirements of the Act and to conform to those provisions of law imposed upon national banks which prohibit such banks from lending on or purchasing

their own stock, which relate to the withdrawal or impairment of capital, and which relate to the payment of unearned dividends. 12 U.S.C.A. §324. The section further provides that as a condition to membership in the Federal Reserve System, such state banks shall be subject to examinations made by direction of the Board or of the Federal Reserve Bank by examiners selected and approved by the Board. 12 U.S.C.A. §325. And the section further provides that if at any time it shall appear to the Board that a state bank member has failed to comply with the provisions of the Act, or the regulations of the Board made pursuant thereto, it shall be within the power of the Board after hearing to require such bank to surrender its stock in the Federal Reserve System and to forfeit all rights and privileges of membership. 12 U.S.C.A. §327. Under the clear commands of the statute, after a state ban khas been admitted to membership in the Federal Reserve System it must meet certain requirements. One of such requirements is compliance with the capital and reserve exactions of the Act. Another is compliance with the restrictions and inhibitions of the Act against the impairment of the capital of the bank. And where a state bank member fails to comply with the requirements of the Act in respect to its capital and reserve, or fails to comply with the restrictions or inhibitions against the impairment of its capital, the Board is expressly vested with power after hearing to require such bank to surrender its stock in the Federal Reserve Bank and to forfeit all rights and privileges of membership in the Federal Reserve System. In respect to a state bank meeting these require-

ments of the Act, the duties and functions of the Board are not merely coterminus with the making of the application for membership and the admission of the applying bank into membership of the Federal Reserve System. Instead, it is the continuing duty and function of the Board to see that such bank either comply with the capital and reserve requirements of the Act and does not suffer impairment of its capital structure or surrenders its stock in the Federal Reserve Bank and cease to be a member of the Federal Reserve System. The object and purpose of the scheduled hearing now under consideration was to inquire into the condition of the Bank in respect to whether it had suffered inadequacy of capital structure, if so what corrective procedure should be invoked, and whether the Bank should be required to surrender its stock in the Federal Reserve Bank and cease to be a member of the Federal Reserve System. And we entertain no doubt that under the provisions of the section of the Act, the Board had power to conduct the hearing for such purposes.

Section 9 of the Act does not stand alone in point of present pertinence. By section 11(i), as amended, the Board is required to perform the duties, functions, and services specified in the Act, and it is authorized to make rules and regulations necessary to enable it effectively to perform the same. 12 U.S.C.A. §248(i). The provision amounts to a general grant of power to make rules and regulations in harmony with the objects and purposes of the Act and reasonably adapted to the effective discharge of the duties and functions of the Board under the Act. The Board promulgated and for many years has maintained Regulation

H relating to conditions of membership of state banking institutions in the Federal Reserve System. The regulation provides among other things that such banks shall at all times conduct their business and exercise their powers with due regard to the safety of their depositors; and that the net capital and surplus of such banks shall be adequate in relation to the character and condition of their assets and to their deposit liabilities and other corporate responsibilities. The regulation is in harmony with the objectives and purposes of the Act. It is reasonably adapted to further the discharge of the duties and functions of the Board under the Act. And its promulgation and maintenance constitute permitted administrative action under the Act. The scheduled hearing was intended and designed to ascertain whether the Bank had failed and was continuing to fail to meet the requirements of the Act and the regulation, if so what should be done to bring its condition into compliance with the Act and the regulation in respect to capital adequacy, and in the event of continued failure to meet the requirements of the Act and the regulation whether the Bank should cease to be a member of the Federal Reserve System. That being its purpose, the hearing was within the purview of the Act and the regulation, considered in their entirety.

The Board was clothed with power to order the hearing. The authority to conduct the hearing and take the evidence was regularly delegated to the trial examiner, and the examiner was acting well within the range of authority delegated to him. In such circumstances, the Board was an indispensable party to

the action to restrain the conducting of the hearing. And the Board not being a party, the court correctly entered its judgment of dismissal. Larson v. Domestic and Foreign Commerce Corp., supra; State of New Mexico v. Backer, supra; Oyler v. McKay, supra; Ogden River Waters Users' Association v. Weber Basin Water Conservancy, supra.

The judgment is

AFFIRMED.

APPENDIX B

PORTIONS OF SECTION 9 OF THE FEDERAL RESERVE ACT AS AMENDED:

12 U.S.C. 321

Any bank incorporated by special law of any State, or organized under the general law of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal reserve system, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. For the purposes of membership of any such bank the terms "capital" and "capital stock" shall include the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation. The Board of Governors of the Federal Reserve System, subject to the provisions of this title and to such conditions as it may prescribe pursuant thereto, may permit the applying bank to become a stockholder of such Federal reserve bank.

Upon the conversion of a national bank into a State bank, or the merger or consolidation of a national bank with a State bank which is not a member of the Federal Reserve System, the resulting or con-

tinuing State bank may be admitted to membership in the Federal Reserve System by the Board of Governors of the Federal Reserve System in accordance with the provisions of this section, but, otherwise, the Federal Reserve bank stock owned by the national bank shall be cancelled and paid for as provided in section 287 of this title. Upon the merger or consolidation of a national bank with a State member bank under a State charter, the membership of the State bank in the Federal Reserve System shall continue.

As amended Aug. 17, 1950, c. 729, § 8, 64 Stat. 458; July 15, 1952, c. 753, § 2(a), 66 Stat. 633.

* * * *

12 U.S.C. 323

Whenever the Board of Governors of the Federal Reserve System shall permit the applying bank to become a stockholder in the Federal Reserve Bank of the district its stock subscription shall be payable on call of the Board of Governors of the Federal Reserve System, and stock issued to it shall be held subject to the provisions of this Act.

Dec. 23, 1913, c. 6, § 9, 38, Stat. 259; June 21, 1917, c. 32, § 3, 40 Stat. 232; Aug. 23, 1935, c. 614, § 203 (a), 49 Stat. 704.

* * * *

12 U.S.C. 324

All banks admitted to membership under authority of this section shall be required to comply with the reserve and capital requirements of this Act and to conform to those provisions of law imposed on national banks which prohibit such banks from lending

on or purchasing their own stock, which relate to the withdrawal or impairment of their capital stock, and which relate to the payment of unearned dividends. Such banks and the officers, agents, and employees thereof shall also be subject to the provisions of and to the penalties prescribed by sections 334, 656, and 1005 of Title 18, United States Code, and shall be required to make reports of condition and of the payment of dividends to the Federal Reserve Bank of which they become a member. Not less than three of such reports shall be made annually on call of the Federal Reserve Bank on dates to be fixed by the Board of Governors of the Federal Reserve System. Failure to make such reports within ten days after the date they are called for shall subject the offending bank to a penalty of $100 a day for each day that it fails to transmit such report; such penalty to be collected by the Federal Reserve Bank by suit or otherwise. Such reports of condition shall be in such form and shall contain such information as the Board of Governors of the Federal Reserve System may require and shall be published by the reporting banks in such manner and in accordance with such regulations as the said Board may prescribe.

As amended Sept. 3, 1954, c. 1263, § 27, 68 Stat. 1236.

* * * *

12 U.S.C. 325

As a condition of membership such banks shall likewise be subject to examinations made by direction of the Board of Governors of the Federal Reserve System or of the Federal Reserve Bank by examiners

selected or approved by the Board of Governors of the Federal Reserve System.

Dec. 23, 1913, c. 6, § 9 (par.), as added June 21, 1917, c. 32, § 3, 40 Stat. 232; and amended Aug. 23, 1935, c. 614, § 203 (a), 49 Stat. 704.

* * * *

12 U.S.C. 327

If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal Reserve Bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by said sections.

Dec. 22, 1913, c. 6 § 9, 38 Stat. 259; June 21, 1917, c. 32 § 3, 40 Stat. 232; Apr. 23, 1930, c. 207, § 2, 46 Stat. 251; Aug. 23, 1935, c. 614, § 203(a), 49 Stat. 704.

* * * *

PORTION OF SECTION 11 OF THE FEDERAL RESERVE ACT AS AMENDED:

12 U.S.C. 248

The Board of Governors of the Federal Reserve System shall be authorized and empowered: . . .

(i) To require bonds of Federal Reserve agents, to make regulations for the safeguarding of all collateral bonds, Federal reserve notes, money or property of any kind deposited in the hands of such agents, and said board shall perform the duties, functions, or services specified in this Act and make all rules and regulations necessary to enable said board effectively to perform the same.

Dec. 23, 1913, c. 6, § § 11, 16, 38 Stat. 261, 262, 265; Sept. 7, 1916, c. 461, 39 Stat. 752; Sept. 26, 1918, c. 177, § 2, 40 Stat. 968; Feb. 27, 1921, c. 75, 41 Stat. 1146; June 26, 1930, c. 612, 46 Stat. 814; Mar. 9, 1933, c. 1, § 3, 48 Stat. 2; June 16, 1933, c. 89, § 7, 48 Stat. 167; Aug. 23, 1935, c. 614, § § 203 (a), 321 (a), 342, 49 Stat. 704, 713, 722.

* * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 736

THE CONTINENTAL BANK AND TRUST COMPANY OF SALT LAKE CITY, UTAH, PETITIONER

v.

EMERY J. WOODALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The oral opinion and order of the district court is set forth in Appendix A, *infra*, pp. 18–20. The opinion of the Court of Appeals (Pet. 17–24) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 2, 1957. The petition for a writ of certiorari was filed February 1, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the authority of the Board of Governors of the Federal Reserve System to order changes in the capital structure of a member bank is subject to judicial review in an action to restrain the conduct of a hearing called to determine the necessity of ordering such a change, when no irreparable injury has been proved.

2. Whether the Board of Governors of the Federal Reserve System is an indispensable party to an action seeking to enjoin a duly appointed examiner from conducting an administrative hearing ordered by the Board when the ground alleged for such judicial relief is that the Board did not have authority under the Federal Reserve Act to order the hearing.

STATUTES AND REGULATIONS INVOLVED

Pertinent portions of the Federal Reserve Act, as amended (Act of December 23, 1913, 38 Stat. 251), of Regulation H of the Board of Governors of the Federal Reserve System (12 C. F. R. 208), and of the Rules of Procedure of the Board of Governors of the Federal Reserve System (12 C. F. R. 263) are set forth in Appendix B, *infra*, pp. 21 to 26.

STATEMENT OF THE CASE

THE ADMINISTRATIVE PROCEEDING

The administrative proceeding involved was instituted by the Board of Governors of the Federal Reserve System, hereinafter called the Board. The petitioner, hereinafter referred to as the bank, is a member state bank in the Federal Reserve System.

DARK PAGE

At the time the bank became a member of the Federal Reserve System in 1952, the Board had adopted and published its Regulation H, which is still in effect, prescribing conditions of membership of state banking institutions in the Federal Reserve System. Regulation H requires as conditions of membership in the Federal Reserve System that (a) member banks shall at all times conduct their business and exercise their powers with due regard to the safety of their depositors, and (b) that the net capital and surplus funds of such banks shall be adequate in relation to the character and condition of their assets and to their deposit liabilities and other corporate responsibilities.[1]

On June 29, 1956, in compliance with the requirements of the Administrative Procedure Act (5 U. S. C. 1004 (a)), the Board issued to the bank a notice of the institution of an administrative proceeding with formal hearing under Section 9 of the Federal Reserve Act (12 U. S. C. 327). The notice stated that if the reports of examination of the bank are correct they "would appear to indicate that the net capital and surplus funds of The Continental Bank and Trust Company may be inadequate," and that this administrative hearing was deemed necessary for the purpose of determining:

> (a) The adequacy or inadequacy of the net capital stock and surplus of The Continental Bank and Trust Company in relation to the

[1] The text of these two conditions of membership is printed in Appendix B, pp. 23-24.

character and condition of its assets and to its present and prospective deposit liabilities and its other corporate responsibilities; and

(b) What net additional amount, if any, of capital funds is needed by The Continental Bank and Trust Company to have an adequate capital structure; and

(c) What is a reasonable period of time to allow The Continental Bank and Trust Company to affect any increase of its capital funds as may be found to be needed to make them adequate before being required by the Board of Governors to surrender its capital stock in the Federal Reserve Bank of San Francisco and to forfeit all its rights and privileges of membership in the Federal Reserve System for failure to do so (D. R. 6–8).[1]

The notice also stated that the hearing would "be held before a trial examiner to be appointed or selected by the Civil Service Commission in accord with the provisions of Section 11 of the Administrative Procedure Act of 1946, as amended (5 U. S. C. 1010)," and that the hearing, and the proceedings following the hearing, would "be conducted in accord with the applicable requirements of that Act and the Rules of Practice for Formal Hearings of the Rules of Procedure of the Board of Governors of the Federal Reserve System."

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[1] "D. R." refers to the record of the district court as certified to the Court of Appeals, consisting of pages numbered 1–39. "A. R." refers to the record of the Court of Appeals, consisting of pages numbered 1–17. This type of record reference is necessary to avoid confusion since petitioner did not paginate the entire record consecutively.

In accord with Rule III (b) of the Board's Rules of Practice for Formal Hearing,[4] the notice provided that the hearing before the examiner would be private, attended only by the representatives, counsel and witnesses of the bank and of the Board, unless the bank made a written request to the Board that other persons be permitted to attend or that the hearings be made public. The bank requested that the hearing be held in Salt Lake City, Utah, and that it be open to the public and press and this request was granted (D. R. 40–42).

The bank demanded and was given a "Statement of Particulars With Respect to Legal Authority and Jurisdiction and Matters of Fact and Law Asserted" (D. R. 9–13).

The bank filed with the Board a "Motion that Hearing Be Dismissed for Lack of Jurisdiction," and after consideration thereof the Board issued its order denying the motion (D. R. 24–29). The bank did not appeal from this interlocutory order of the Board. The hearing was set to commence in Salt Lake City on October 3, 1956.

The respondent, Emery J. Woodall, hereinafter referred to as the examiner, is a duly appointed and commissioned examiner under Section 11 of the Administrative Procedure Act (5 U. S. C. 1010).[5] Under the Board's Rules of Practice for Formal Hearings he is authorized to (*a*) preside at the taking of evi-

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[4] Appendix B, *infra*, p. 24.

[5] This is admitted by the bank in its complaint (D. R. 1, par. 2).

dence in the hearing ordered by the Board; and (*b*) report to the Board after the conclusion of the hearing his recommended decision. (Federal Reserve Board Rules of Procedure, Rule VI, 12 C. F. R. 263.6.)

PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

On October 1, 1956, two days before the scheduled commencement of the administrative hearing, without notice to the examiner or to the Board, the bank appeared *ex parte* before the United States District Court for the District of Utah and presented its complaint, praying a permanent injunction against the examiner prohibiting him from conducting the hearing, on the asserted ground that the Board had no statutory authority to institute the administrative proceeding and hearing for the purpose of taking evidence with respect to the capital adequacy of the bank (D. R. 1–5). The complaint further alleged the bank would be irreparably damaged by the conducting of the hearing. An affidavit of the president of the bank was submitted by the bank to support its allegation of irreparable damage (D. R. 14–17). The bank requested and was granted a temporary restraining order prohibiting the examiner from commencing the administrative hearing pending the hearing on the bank's motion for a preliminary injunction, which was set for October 9, 1956.

The examiner arrived in Salt Lake City on October 2, 1956, and was served on that day with the temporary restraining order. He promptly moved the

district court on October 2, 1956, to advance the scheduled October 9, 1956, hearing on the motion for preliminary injunction to October 3, 1956, and simultaneously to hear and rule upon the examiner's motion to dismiss the temporary restraining order and complaint. This request was orally granted.

With his motion to dismiss the examiner filed a counteraffidavit with respect to the irreparable damages alleged by the bank (D. R. 34–40).

The examiner's motion was based on the ground that the district court did not have jurisdiction to adjudicate the statutory powers of the Board in this action or to grant the injunction prayed by the bank because (*a*) The Board was an indispensable party since the action attacked its authority and the Board was not before the court; (*b*) the bank had not exhausted its administrative remedies and was not subject of any final order of the Board; and (*c*) the bank had failed to prove that any immediate or truly irreparable injury would result from the holding of the administrative hearing.

After argument the district court found that the Board was an indispensable party and on this ground dismissed and dissolved the temporary restraining order, denied the bank's motion for preliminary injunction and dismissed the bank's complaint (D. R. 51, 54).

The bank filed its notice of appeal on October 4, 1956 (D. R. 44).

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PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS

The examiner was restrained from going forward with the administrative hearing by the United States Court of Appeals for the Tenth Circuit pending its decision on the appeal (A. R. 1). On January 2, 1957, the Court of Appeals issued its opinion affirming the judgment of the district court (A. R. 5–14). In response to the bank's motion, the Court of Appeals stayed its mandate and again restrained the examiner from commencing the administrative hearing for thirty days in order that the bank might file a petition for writ of certiorari (A. R. 16). The petition was filed within the thirty-day period.

ARGUMENT

The sole argument in the petition is that the Board of Governors has no authority to require member banks in the Federal Reserve System to increase their capital (Pet. 7–16). We do not believe that issue is properly before this Court since a consideration of the Board's power is premature because the Board has not ordered such an increase and, in fact, has not even been able to commence the hearing to determine whether such an increase is necessary. Moreover, the district court was without jurisdiction to enjoin the hearing because of the failure of the petitioner to join an indispensable party, the Board of Governors of the Federal Reserve System. Therefore, although we believe the statute clearly gives the Board authority, we do not discuss that issue here.

1. In seeking to test the Board's authority to issue the ultimate order which is the object of the hearing, by praying an injunction against the conduct of the hearing, the petitioner ignores a consistent line of cases decided by this Court that such action is premature. As is pointed out above, the petitioner's only basis for seeking the injunction is that the Board of Governors has no authority to order its continued membership in the Federal Reserve System to be conditioned on an increase in its capital.[4] In presenting this issue, the petitioner does not attempt to distinguish, in fact does not even cite, any of the cases holding that in such circumstances there must first be an exhaustion of administrative remedies. In the leading case, *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, this Court referred at pages 50–51 to

> • • • the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

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[4] Such membership is not a prerequisite to the Bank's engaging in the banking business. Many state incorporated banks, both large and small, are not members of the Federal Reserve System. The bank, like any other member State bank, may withdraw from membership in the Federal Reserve System at any time and continue in the banking business as a nonmember State bank (12 U. S. C. 328). It may also continue in the banking business if it is expelled from membership by the Board of Governors under 12 U. S. C. 327.

The Court has reasserted this principle in recent years. See *eg. Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U. S. 237; *Franklin* v. *Jonco Air-Aircraft Corp.*, 346 U. S. 868; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535; *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 366.

Since the petitioner makes no attempt to meet this line of authority, it can only be assumed from the representations made to the district court that it claims an exception on the ground that the mere holding of a hearing or the issuance of an order, apart from its enforcement, would result in irreparable injury to it. This type of argument was presented in the *Bethlehem Shipbuilding* case and rejected, 303 U. S. at 51-52:

> Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.

And in *Allen* v. *Grand Central Aircraft Co.*, the Court states, 347 U. S. at 540:

> However, it is clear that once the right of the Government to hold administrative hearings is established, a litigant cannot enjoin them merely because they might jeopardize his bank credit or otherwise be inconvenient or embarrassing.

See also *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540.

In its complaint the petitioner alleged that the holding of the hearing would tend to undermine the confidence of its customers and depositors and endanger its ability to perform its normal banking functions (D. R. 3) Before the district court, the bank relied on the affidavit of its president to support this assertion.' A counter-affidavit shows that this very man, who with his family controlled a majority of the bank's stock and determined its policies, was the official who had requested that the hearing be held in Salt Lake City and that it be open to the public, indicating that he anticipated no unfavorable result from the publicity (A. R. 38–40). There is no hint of why he should have changed his opinion.

The Federal Reserve Act (12 U. S. C. 327) and the Administrative Procedure Act (5 U. S. C. 1004–1007; 1009; 1010) require that the bank be accorded

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[1] In *Eccles* v. *Peoples Bank*, 333 U. S. 426, doubt was cast upon the value of evidence of this nature, the Court stating at page 434, "But, as we have seen, the Bank's grievance here is too remote and insubstantial, too speculative in nature, to justify an injunction against the Board of Governors, and therefore equally inappropriate for a declaration of rights. This is especially true in view of the type of proof offered by the Bank. Its claims of injury were supported entirely by affidavits. Judgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, though use of a declaratory summary judgment. Modern equity practice has trended away from a procedure based on affidavits and interrogatories, because of its proven insufficiencies. Equity Rule 46 forbids such practice save in exceptional cases."

an adequate hearing before the Board in this matter. The Board, in compliance with these statutes, has ordered such a hearing (D. R. 6-8). Furthermore, the Rules of Procedure of the Board and the requirements of the Administrative Procedure Act guarantee procedural due process in the administrative hearing. If and when the bank becomes the subject of a final order or action of the Board directing an increase in its capital funds or forfeiture of membership, the Administrative Procedure Act (5 U. S. C. 1009) accords the bank full judicial review of the legality of such final order or action.

The need for orderly administrative procedure, which is the basis of the doctrine of exhaustion of administrative remedies, is peculiarly applicable in this case. As pointed out by this Court in the *Eccles* case, *supra* (333 U. S. at p. 433), the Board is "* * * a body entrusted with some of the most delicate and grave responsibilities in our Government * * * ". The question of capital adequacy of member banks is intricately related to the safety of depositors, the soundness of our Federal Reserve System and of our national credit structure. The orderly administration of the Federal Reserve System requires that these issues first be decided by the Board in the interest of a uniform and expert administration of the detailed and comprehensive money and banking regulatory scheme laid down by the Federal Reserve Act, before being reviewed by the courts.

Sound determination of such financial matters as adequacy of a member bank's capital and its relationship to safety of depositors' funds, to a strong bank-

ing system and the credit structure, and to the other purposes of the Federal Reserve Act, is not purely a question of law and does not involve only facts of common knowledge to the judiciary. It requires the consideration of much technical and expert extrinsic evidence.' This need is compellingly demonstrated in the petition (pp. 9-14) where, without the benefit of any evidence of record, the bank finds it necessary to discuss the significance of such technical matters as ratios of capital to deposits, ratios of capital funds to total assets, risk asset ratios, "tight money," capital adequacy and capital impairment.

Under these circumstances and in the present posture of the administrative proceeding, the bank's request for judicial review is unquestionably premature.

2. The bank's action in the district court was against the examiner only. The Board was not, and is not, a party to the action.[5] The action did not challenge

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[4] This Court has recently pointed out in *United States* v. *Western Pacific Railroad Co.*, 352 U. S. 59, at 66-68, the determination of economic issues entrusted to administrative bodies "* * * 'is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts * * * is indispensable; and such acquaintance is commonly to be found only in a body of experts.' * * * And for the court here to undertake to fix the limits of the tariff's application without knowledge of such factors, and the extent to which they are present or absent in the particular case, is tantamount to engaging in judicial guesswork."

[5] Neither the Board nor its members could have been served in Utah since its principal office is in the District of Columbia (12 U. S. C. 244).

ED THRU

the validity of the appointment of the examiner, or his authority to preside at the taking of evidence in the hearing. It was not pleaded or asserted in the action at any time that the bank was being denied procedural due process.

Only the Board's authority and power to order the hearing for the purposes stated are challenged in the bank's complaint. The principal relief sought by the bank's complaint was that the district court declare Section 7 of the Board's Regulation H (Appendix B, *infra*, pp. 23-24), requiring that the capital of member banks be adequate, to be "wholly void and beyond the jurisdiction, authority and powers of the Board of Governors of the Federal Reserve System" (D. R. 4-5). Restraining the conducting of the administrative hearing was only incidental to this main relief sought.

The decree sought by the bank could not effectively grant the principal relief sought by expending itself on the examiner, since he has no authority whatever with respect to this condition of membership. To be effective such a decree must bind the Board and, if binding on the Board, would interfere with its public administration of the Federal Reserve System. Obviously, therefore, the Board is an indispensable party to this action, and since the Board was not a party, the courts below correctly ruled that the bank's action should be dismissed for want of jurisdiction.

Petitioner cites *Williams* v. *Fanning*, 332 U. S. 490; *Hynes* v. *Grimes Packing Company*, 337 U. S. 86, and *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, as authority for the proposition that the Board is not an indispensable party (Pet. 15). In each of those cases, however, the court had before it a subordinate of the higher authority to whom had been delegated the authority to enforce the regulation under attack. Here, in contrast, the examiner was merely a hearing officer whose duties under the Board's Rules of Practice (Rules III and VI, Appendix B, *infra*, pp. 24–26) were to preside at the taking of evidence and to report to the Board. It was not he who ordered the hearing, but the Board. What is more he was actually appointed by the Civil Service Commission under Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) and was certainly not a subordinate in the same sense as the officials named as defendants in the cases cited by petitioner. Although the cases do hold that it is not necessary to join the superior officer when the named defendant is locally responsible for carrying out the functions of the superior, none of them hold he can be dispensed with when no one is named who has the responsibility of protecting the governmental function involved.

The only decided case in which the question was presented as to whether the Board was an indispensable party in an action against a Federal Reserve

Bank "to annul and enjoin the enforcement of a condition of membership" in the Federal Reserve System held that the Board was an indispensable party and the action was dismissed for failure of the complainant to join the Board. *Peoples Bank v. Federal Reserve Bank of San Francisco, et al.*, 58 F. Supp. 25 (S. D. Cal.), appeal dismissed, 149 F. 2d 850 (C. A. 9). In that case the court said at p. 30:

> It is thus evident from the law that the Board is the only body vested by Congress with authority to admit and expel state member banks. That that is true is equally evident from Regulation H, promulgated by the Board and governing the membership of state banks (C. F. Reg., U. S. C., Tit. 12, Ch. 11, Part 308) * * *. As a subaltern without authority, the Reserve Bank may not be sued alone for the alleged misfeasance of the admitted superior. The relief sought is from the Reserve Board, not the Reserve Bank. To allow this suit to be maintained as against the subordinate alone would be contrary to the settled rules of equity practice.

In the circumstances of this case, therefore, the court below was entirely justified in holding that the Board was an indispensable party.

CONCLUSION

For these reasons it is respectfully submitted that the judgment of the court below was correct, that it does not present any conflict requiring resolution of

this Court, and that in its present stage there is no important question justifying review here.

Respectfully submitted.

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Solicitor General.

JOHN F. DAVIS,
Assistant to the Solicitor General.

GEORGE B. VEST,
General Counsel,

BERNARD B. PAWLEY, JR.,
Special Counsel,
Board of Governors of the
Federal Reserve System.

FEBRUARY 1957.

APPENDIX A

Oral Ruling of the United States District Court for the District of Utah, Central Division, October 3, 1956

The Court. I would prefer to base it on the preamble in this Act, its general purposes, the beneficent intent of the legislation, and the extremely broad regulatory and supervisory power over member banks, and particularly upon the rule-and-regulation-making power, which is extremely broad, as it always is in these cases.

I am talking about Section 11 (i): "* * * and said board shall perform the duties, functions, or services specified in this Act—" And certainly in this Act supervision and regulation is specified "—and make all rules and regulations necessary to enable said board effectively to perform the same."

It just seems to me I cannot, in good conscience whittle down the express language of Congress with respect to those matters and give the emphasis that you ask me to give, Mr. Billings, to the four words, "specified in this Act," which you find in Paragraph 9. It just seems to me that that would not be good common sense, having in view the purposes of this legislation, having in view the broad regulatory and supervisory powers, having in view the very broad rule-and-regulation-making power, and having in view the beneficent purposes and results of the banking regulation over the period of time since 1913, the whole history of this legislation, its purpose. It seems

to me to emasculate the Board by saying they cannot look into the capital structure of a member bank and suggest to them the less drastic action of requiring them to raise their authorized and issued capital rather than suffer a suspension. That doesn't make sense to me.

Now, there is only one other thing that has been troubling me, and we haven't talked about that at all.

As I understand it, the question is submitted to me now on a motion to dismiss, is that correct?

Mr. Powell. That is correct, your honor, a motion to set aside the temporary restraining order, to dismiss the plaintiff's motion for a preliminary injunction, and to dismiss the plaintiff's complaint, which prays for a permanent injunction.

* * * * *

The Court. The defendant's motion to set aside the temporary restraining order, to dismiss the plaintiff's motion for a preliminary injunction, and to dismiss the plaintiff's complaint is granted. That will be the order (A. R. 49-51).

* * * * *

The Court. Now, I didn't spell out the whole matter we have before us. Of course, we have in the course of the discussion.

I think this case follows necessarily the Oyler case, it follows necessarily the case from New Mexico involving the Bureau of Reclamation down there, and it follows my case, the Ogden Water Users Association and the Weber River Conservation District, which was argued in the last ten days over the Circuit and hasn't come down as yet.

In other words, what I am, in effect, holding is that the Board of Governors, perhaps the United States of America, is a necessary party to this proceeding, an

indispensable party. The United States hasn't consented to be sued and the Board of Governors isn't in this jurisdiction.

My Capital Reef Monument case, which is the Oyler case, involved the Secretary of the Interior McKay, and he was not here. The Circuit has adopted that line of authority. And, as you say, the mark of differentiation in these cases is whether or not the agency had or had not authority, and that is why we have been going into it.

I am not passing upon a substantive question; I am passing only upon the procedural question, the jurisdictional question here, but necessarily we had to go into the question of authority in order to decide that.

I think the Board had the authority, that Woodall has the authority to hold this hearing out here, and if there is an excess or abuse of that authority, I haven't any power to hear you on it because the United States is not here and the Board of Governors of the Federal Reserve Bank is not here.

Now, that a little more fully spells out what I have in mind in this case. I won't prepare a written opinion on it.

With respect to your stay, it does seem to me there is very little difficulty. Judge Sam Bratton is at Albuquerque normally—I don't know where he is now—Judge Phillips is over in Denver, Judge Pickett is in Cheyenne, Judge Murrah is down at Tulsa, and we have a judge over at Topeka; and you have a telephone. I think I have interfered in this hearing as much as I care to interfere with it (A. R. 53-55).

APPENDIX B

FEDERAL RESERVE ACT (ACT OF DECEMBER 23, 1913, 38 STAT. 251, AS AMENDED)

SEC. 9 (1) (12 U. S. C. 321):

Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. * * *

SEC. 9 (6) (12 U. S. C. 324):

All banks admitted to membership under authority of this section shall be required to comply with the reserve and capital requirements of this Act and to conform to those provisions of law imposed on national banks which prohibit such banks from lending on or purchasing their own stock, which relate to the withdrawal or impairment of their capital stock, and which relate to the payment of unearned dividends. * * *

Sec. 9 (9) (12 U. S. C. 327):

If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section.

Sec. 9 (11) (12 U. S. C. 329):

No applying bank shall be admitted to membership unless it possesses capital stock and surplus which, in the judgment of the Board of Governors of the Federal Reserve System, are adequate in relation to the character and condition of its assets and to its existing and prospective deposit liabilities and other corporate responsibilities: *Provided*, That no bank engaged in the business of receiving deposits other than trust funds, which does not possess capital stock and surplus in an amount equal to that which would be required for the establishment of a national banking association in the place in which it is located, shall be admitted to membership unless it is, or has been, approved for deposit insurance under the Federal Deposit Insurance Act. The capital stock of a State member bank shall not be reduced except with the prior consent of the Board.

Regulation H, as Amended (12 C. F. R. 238)

Membership of State Banking Institutions in the Federal Reserve System

Section 1. Conditions of Membership.

(a) Pursuant to the authority contained in the first paragraph of section 9 of the Federal Reserve Act, which authorizes the Board to permit applying State banks to become members of the Federal Reserve System "subject to the provisions of this act and to such conditions as it may prescribe pursuant thereto," the Board, except as hereinafter stated, will prescribe the following conditions of membership for each State bank hereafter applying for admission to the Federal Reserve System, and, in addition, such other conditions as may be considered necessary or advisable in the particular case:

1. Such bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, and, except with the permission of the Board of Governors of the Federal Reserve System, such bank shall not cause or permit any change to be made in the general character of its business or in the scope of the corporate powers exercised by it at the time of admission to membership.

2. The net capital and surplus funds of such banks shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities.

* * * * *

(e) If at any time, in the light of all the circumstances, the aggregate amount of a member State bank's net capital and surplus funds appears to be inadequate, the bank, within such period as shall be deemed by the Board to be

reasonable for this purpose, shall increase the amount thereof to an amount which in the judgment of the Board shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities.

(12 C. F. R. 208.7)

Rules of Practice for Formal Hearings
(12 C. F. R. 263)

Rule III

Hearings for the purpose of taking evidence

(a) Hearings for the purpose of taking evidence shall be held as ordered by the Board, and the Board may provide for such a hearing to be held before a duly designated officer, herein referred to as a trial examiner.

(b) All such hearings shall be private and shall be attended only by respondents and their representatives or counsel, representatives of the Board, witnesses, and other persons having an official interest in the proceedings: *Provided, however,* That on the written request of one or more respondents or counsel for the Board, or on its own motion, the Board, when not prohibited by law, may permit other persons to attend or may order the hearing to be public.

(c) All such hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to a respondent or respondents (and to any person applying therefor if the Board has ordered the hearing to be public) at the prescribed rates.

(d) A trial examiner may at any time withdraw if he deems himself disqualified; and, upon filing in good faith of a timely and sufficient affidavit of per-

sonal bias or disqualification of the trial examiner, the Board will determine the matter as a part of the record and decision in the case.

(e) Except as permitted by the Administrative Procedure Act (60 Stat. 237) the trial examiner shall not consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate, nor be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions.

(f) The trial examiner shall have authority in connection with the hearing to administer oaths and affirmations, rule upon offers of proof and receive relevant evidence, regulate the course of the hearing, hold conferences for the settlement or simplification of the issues by consent of the parties, dispose of procedural requests or similar matters, certify any question to the Board (at his discretion or at the Board's direction) for its consideration and disposition, and take other action consistent with the rules or regulations of the Board and other requirements of law.

(g) Any oral or documentary evidence may be received, except that irrelevant, immaterial, or unduly repetitious evidence shall be excluded.

(h) Objections to the admission or exclusion of evidence shall be in short form, stating the grounds of objections relied upon, and the transcript shall not include argument or debate thereon except as ordered by the Board or the trial examiner. Rulings on such objections shall be a part of the transcript except as the Board may otherwise require with respect to a particular ruling. Exception to any such ruling must be noted before the trial examiner in order to be

urged in the consideration of the matter by the Board, except as otherwise permitted by the Board.

(i) The Board or trial examiner may call for the production of further evidence upon any issue, and, upon appropriate notice, the trial examiner may reopen any hearing at any time prior to his report the Board may reopen any hearing at any time prior to its order disposing of the proceeding.

* * * * *

(12 C. F. R., Sec. 263.3)

Rule VI

TRIAL EXAMINER'S REPORT

(a) The trial examiner, within 15 days after the expiration of the time allowed for filing proposed findings and conclusions, or within such different period as the Board may prescribe, shall file with the Secretary of the Board his report containing his recommended decision.

(b) A copy of such report shall be forthwith served on each party and on counsel to the Board by the Secretary of the Board or such other person as the Board may designate for the purpose.

(12 C. F. R., Sec. 263.6)

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IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1956

THE CONTINENTAL BANK AND TRUST COMPANY OF SALT LAKE CITY, UTAH,

Petitioner,

vs.

EMERY J. WOODALL,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

STATEMENT

In view of the fact that Respondent has chosen to dismiss the issues presented in the Petition for Certiorari with the statement "we do not discuss that issue here" and to becloud the situation by devoting the entirety of his brief to procedural arguments which apparently did not trouble either the trial court or the Court of Appeals for the Tenth Circuit, Petitioner herewith, pursuant to Paragraph 4 of Rule 24, submits its Reply Brief to those arguments.

ARGUMENT

1. The first argument Respondent makes is that the administrative remedies have not been exhausted.

Under the statute pursuant to which the Federal Reserve Board is purporting to proceed (12 U.S.C. 327), it must hold a hearing before it can expel Petitioner from the Federal Reserve System. Petitioner moved to dismiss the administrative proceeding on the ground the Federal Reserve Act did not give the Board authority to conduct a hearing as to bank capital adequacy. The Federal Reserve Board, *not* the trial examiner, issued a six page "Statement and Order" denying such motion. (DR 24-29) Until overruled by a court, such order is final. Having exhausted its remedy before the administrative agency, Petitioner then sought judicial review by this action under Section 10 of the Administrative Procedure Act and the principles announced by this Court in *Eccles* v. *People's Bank*, 333 U.S. 426, 434 (1948), where this Court said:

> "A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is insufficiently compelling to justify judicial intervention even before the completion of the administrative process."

In that case the majority opinion determined that as there was no actual attempt by the Board to enforce the illegal condition of membership, the issue was not ripe for adjudication. Two of the Justices dissented, stating:

> "The damage from its actual or threatened

> injury is, of course, irremedial. Any bank would be seriously injured by even an effort to oust it from the system . . . If governmental power is being unlawfully used to constrain respondent's operation of its business, respondent is entitled to protection, now." 333 U.S. 426, 436.

It is Petitioner's contention that the views of both majority and the minority in the People's Bank case are clearly applicable here where the Board is actually proceeding to oust Petitioner from Federal Reserve System membership on the grounds of capital inadequacy and has ruled finally it has the statutory power to do so. What stronger showing of immediate and true injury is required?

Respondent further maintains that this Court cannot determine a question of law, i.e., the interpretation of Section 9 of the Federal Reserve Act, without "consideration of much technical and expert extrinsic evidence". (Respondent's Brief, p. 13.) Respondent's raising of this need for evidence is an admission that the statute does not support his position that "we believe the statute clearly gives the Board authority". (Br. p. 8) Apparently Respondent really believes the existence of such power can *only* be shown by "expert extrinsic evidence" seeking to demonstrate that this power should be read into the statute. If that be so, the decision of the court below dismissing the complaint on motion, without a responsive pleading or the taking of any evidence, should be reversed and the case remanded with appropriate instructions from this court for trial on the merits and the hearing of the evidence.

Petitioner submits that such action is not neces-

sary however. This court is presented with a clear cut legal issue – the interpretation of Section 9 of the Federal Reserve Act. The "extrinsic testimony" of the Board as to what the law ought to be is wholly irrelevant. This is an entirely different issue than whether a Board's order is reasonable under the circumstances. This case presents a question of the existence of power, not whether power is properly exercised.

2. The second argument urged by Respondent is that the Board is not a party to the action. This is true. Petitioner has sought adjudication of its rights in its home district. Inasmuch as the Board could not be served in Utah, the action was instituted against the trial examiner charged with performing the statutory condition precedent of holding a hearing before the Board could impose sanctions under 12 U.S.C. 327. If the trial examiner were enjoined, the Board could proceed no further with its attempt to force Petitioner to increase its capital or be expelled from the Federal Reserve System. It was and is Petitioner's position that this case falls squarely under the doctrine announced by this court in *Williams* v. *Fanning*, 332 U.S. 490; *Hynes* v. *Grimes Packing Company*, 337 U.S. 86, and *Shaughnessy* v. *Pedreiro*, 349 U.S. 48. Respondent admits that these "cases do hold that it is not necessary to join the superior officer when the named defendant is locally responsible for carrying out the functions of the superior", (Respondent's Brief, p. 15) but attempts to distinguish them on the ground that in each case "the court had before it a subordinate of the higher authority to whom had been delegated

the authority to enforce the regulation under attack." It is submitted that this is a distinction without a difference. Here the attack is on the holding of a hearing for a purpose not authorized by law. Respondent has been appointed, under Section 11 of the Administrative Procedure Act, to preside at such hearing. Indeed he is the only person who can hold the requisite hearing. The decisive point in these decisions of this court is not who appointed the agent but whether stopping the agent will give effective relief as against the principal. It is submitted that so far as effective relief is concerned, enjoining an agent charged by one statute with the carrying out of a superior's order unlawful under another statute is no different from enjoining a subordinate from unlawfully impounding mail, closing waters to fishing or deporting an alien pursuant to the unlawful order of the principal. It is not who gave the agent his hat, but whose hat he wears.

CONCLUSION

It is submitted that this case presents in a posture ripe for review an important question of Federal law and that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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